



Generally Speaking

COMINGS and GOINGS

Please welcome **LOA I Janet Armstrong** to the Juneau Commercial and Fair Business Section and **LOA I Nicky Love** who joined the Juneau Labor and State Affairs Section.

David Bogda was welcomed this month as an **Administrative Clerk II** and **Case Manager** for the Juneau Civil Division.

The Kodiak DAO is pleased **ADA Shannon Eddy** has joined their offices. Her presence provided immediate relief following several months' operation of the two-

attorney office with just one attorney. **ADA Eddy** hit the ground running!

The Anchorage DAO welcomed new **LOA Jacklyn Casey** to the Violent Crimes Unit.

Amy Doogan joined the Commercial and Fair Business Section in Anchorage as an AAG. She is assigned to advise and represent the Public Housing Division of Alaska Housing Finance Corporation. She fills the position vacated earlier this year by AAG Cathy Stone. Prior to joining the state, Amy spent four years at the Municipality of Anchorage in the municipal prosecutor's office. While at the municipality, she was initially assigned to the general trial and domestic violence units and was later assigned to handle motions and appeals. AAG Doogan also worked as a law clerk in both the superior court (Judge Reese) and the court of appeals (Judge Stewart). She graduated from Harvard Law School in 2002.

The Juneau Transportation Section welcomed **AAG Sean Lynch** to their offices this month.

KUDOS

Congratulations to **Jean Erickson**, Juneau Oil, Gas, and Mining Section, on her promotion to a **LOA II** on October 14.

The Transportation Section is excited about former **LOA Jessica Harman's** promotion to **Paralegal** in the Fairbanks offices of the Transportation and Collections and Support Sections. Best wishes to Jessica.

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CIVIL DIVISION

Child Protection

New CINA cases based upon allegations in the Office of Children's Services (OCS) petitions:

OCS assumed emergency custody of a toddler after her mother was arrested for domestic violence assault, family violence, and eluding a police officer. The mother has a long history of substance abuse and may have mental health issues. The father's identity is unknown.

OCS requested custody of a child whose sibling had been killed due to abuse in the home. One parent was charged, but the other parent also claimed responsibility.

OCS assumed emergency custody of three children after allegations that the children were at risk due to their parents' substance abuse and domestic violence. An investigation revealed that the parents were abusing heroin and engaging in domestic violence. The children had been in state's custody previously.

The Anchorage Police Department responded to an Anchorage hotel to find a small child being supervised by three very intoxicated adults. Officers witnessed the mother lose her balance and fall onto the child. She was arrested and charged with child neglect. OCS assumed emergency custody as the father has no contact with the child and has a history of substance abuse and domestic violence.

The Anchorage Police Department responded to a report of a disturbance. Upon arrival, they found a mother intoxicated and caring for her two young children. No sober caregivers could be found to care for the children. The mother was arrested for a probation violation. Since the father is incarcerated, OCS assumed emergency custody.

In an attempt to keep the children in the family home safely, OCS had been working with the family for several months to address issues of

substance abuse and general neglect. Ultimately, OCS had to assume emergency custody after the parents were uncooperative, the children's medical needs were not being met, and the children were found in a home strewn with rotting food and feces. The father of one of the children could not be located.

OCS assumed emergency custody of an infant after learning that the father is a registered sex offender with a recent history of sexual abuse towards children. He has never completed treatment. The mother has another child in custody for the same issue. The mother had been told by both police and OCS that the man was a threat to her children. The mother indicated she planned to continue living with the sex offender father.

Two children were taken into OCS custody after determining their mother could not care for them. The mother was abusing prescription medications and had a history of mental illness. OCS had been working with the mother and extended family to keep the children in the home. Those efforts were unsuccessful as the mother was ultimately arrested for child neglect due to her substance abuse. The father is incarcerated.

The Anchorage Police Department responded to a report that people were passed out in the lobby of an area hotel and that there were unsupervised children. Officers found several highly intoxicated people caring for the young children. The police arrested the intoxicated mother. The father of the children is incarcerated and has a history of sexual abuse. OCS assumed emergency custody.

Another mother was found unresponsive in an area hotel with her three children unsupervised. Further investigation established that the mother has struggled with alcoholism for several years. The mother admitted she could not care for her children and OCS assumed custody. The father of three of the children is a registered sex offender who is untreated. The whereabouts of

another father are unknown and the third father denies paternity.

Numerous other children across the state were taken into custody as a result of serious risk of harm due to their parents' substance abuse, domestic violence and/or incarceration.

Other

All AAGs and paralegals in the Child Protection Section across the state were able to attend the 2008 Alaska Child Maltreatment Conference in Anchorage November 4-6. The conference was very educational and well received.

Commercial and Fair Business

State Files Consent Judgment Against Pfizer Inc.

On October 23, Alaska and 33 other states filed consent judgments resolving a five-year multi-state investigation of Pfizer Inc. for its deceptive promotion of Bextra, a "Cox-2" drug designed to reduce pain and inflammation. The multi-state investigation initially focused on whether Pfizer misrepresented that another "Cox-2" drug, Celebrex, was safer and more effective than traditional anti-inflammatory drugs such as ibuprofen and naproxen. As the investigation proceeded, additional concerns were raised about Bextra. Ultimately, the investigation concluded that Pfizer engaged in an aggressive, deceptive, and unlawful campaign to promote Bextra "off label" for uses that had been expressly rejected by the Food and Drug Administration. ("Off label" uses are those that are not approved by the FDA; doctors may prescribe drugs for off-label uses but pharmaceutical companies are prohibited from marketing products for off-label uses). In 2005, Bextra was withdrawn from the marketplace and the FDA required a "black box" safety warning for Celebrex.

The consent judgment contains injunctive terms designed to restrict Pfizer's ability to deceptively promote its products, including prohibitions on

deceptively using scientific data in marketing, distributing samples with the intent to encourage off-label prescribing, providing incentives to sales staff to increase off-label prescribing, using "mentorships" to pay physicians for time spent with Pfizer sales representatives, and using patient testimonials to misrepresent a drug's efficacy. Pfizer also must make a \$60 million payment to the participating states. Alaska's share of the payment is \$580,619. AAG Cindy Drinkwater participated in the multi-state investigation for Alaska.

Consumer Protection Settlements Filed For Approval

In October, AAG Julia Coster filed two consumer protection settlements with the court for approval.

In the Alaska Adventures and Outfitters (AAO) case, the section alleged that the business and its principals took reservations and payments from consumers to provide fishing, guiding, and lodging services, but failed to provide the services or a refund in violation of the Consumer Protection Act. Under the settlement a consent judgment was filed with the court enjoining the defendants from engaging in similar conduct and requiring the payment of full restitution to all consumers harmed by their conduct in the amount of \$44,571.00.

In the case against ERCA (Educational Research Center for America), a multi-state group of states alleged that the company offered gift cards to educators for distributing student surveys, and collected student personal information in surveys, but failed to disclose to students and parents how to opt out of sharing the personal information. The states alleged this conduct violated the Consumer Protection Acts of the participating states. The settlement, in the form of an assurance of voluntary compliance, requires ERCA to stop sending anything of value to educators in connection with the administration of the surveys, and requires ERCA to disclose to students and parents information about opting out of taking the surveys. ERCA is also required to pay the

states \$200,000 to cover their costs and attorneys fees in bringing the case.

Judge Upholds Denial of Public Records Request

Superior Court Judge Patrick McKay issued a favorable decision in *Prichard v. State Department of Commerce, Community and Economic Development* (DCCED). This matter involved an appeal from a partial denial of a public records request for materials in a DCCED investigative file regarding a licensee. The investigation was closed without action against a licensee. Most materials were turned over to the requestor, but some witness statements, a confidential closure letter to the subject of the investigation, a consumer protection complaint, and the identity of the board member who reviewed the results of the investigation were withheld. After an *in camera* review of the documents withheld, the court ruled in favor of the DCCED on every issue, and refused to order the production of any of the withheld documents.

Human Services

Litigation Update

The section continues to work on the following:

Section Chief Stacie Kraly has been working on implementing the *Baker v. Department of Health and Social Services* remand, with assistance from AAGs Kimberly Allen and Kelly Henriksen.

Initial disclosures and other discovery started in the *Reeves* and *Quirate* matter.

One new complaint was filed this month by Alaska Legal Services (*Isaacs v. State*). Section Chief Stacie Kraly will be handling this matter along with AAG Kimberly Allen.

AAG Libby Bakalar had her first oral argument in superior court in *Smart v. Department of Health*

and Social Services and by all accounts, it went very well. The section is now waiting for a decision.

Earlier this year, Section Chief Kraly filed a motion to dismiss in the *Olsen v. Palin* case, where a parent sought relief from the Anchorage School District, the Department of Education and Early Development and the Department of Health and Social Services. All three defendants moved to dismiss; the section's motion was premised on the theory of mootness. Judge Tan granted the motion, dismissing all claims against the Department of Health and Social Services.

AAG Jonathan Clement filed his first appeal in the *Hidden Heights* matter.

There continues to be a variety of Certificate of Need matters at various stages of litigation and at all levels (administrative hearings, superior court and the Supreme Court).

Medicaid

Due to the ProLaw conversion, there are no stats on how many cases were opened or closed, however, during the month of October, the subrogation team resolved 13 cases for a total of \$173,715.98.

Licensing

AAGs Rebecca Polizzotto and Libby Bakalar geared up for an eight-day hearing in Anchorage related to the revocation of a day care facility. However, on the eve of trial, the licensee withdrew the appeal.

Other

On October 15, AAGs Nevhiz Calik and Laura Derry conducted training at Alaska Psychiatric Institute (API) regarding guardianship, conservatorship petitions, and medication petitions. The section is working with the Child Protection Section to take over guardianship petitions for children who are aging out of custody.

Labor and State Affairs

Education

Moore v. State. The second trial of this case concluded this month with closing argument by Dean Guaneli on October 23. After the first trial (in October of 2006), Superior Court Judge Sharon Gleason concluded that state funding for education was sufficient to satisfy the state's constitutional requirements. But the judge also found that the state needed to provide more oversight of education in those school districts with a record of very poor educational performance. She ordered a second trial to hear evidence about the state's oversight efforts. During the first week of trial (last spring), she interrupted the trial and ordered the parties into mediation. The parties were unable to reach an agreement and the trial resumed this month. The decision is pending. The state was represented by AAGs Neil Slotnick and Dean Guaneli, with assistance from Paralegal Terry Begley-Allen.

Olson v. Palin. On October 24, Judge Sen Tan issued his decision in this case. The parents of a special needs child filed suit against the Departments of Education and Early Development and Health and Social Services and the Anchorage School District. At issue was an out-of-state residential placement. But the Department of Health and Social Services did provide the placement. The court concluded that the case was moot, although plaintiffs had also sought decisions on the adequacy of the federally mandated interagency agreements and of the Department of Education and Early Development's supervision of educational services by the Anchorage School District. AAG Neil Slotnick handled the case for the Department of Education and Early Development. And as noted earlier, Human Services Section Chief Stacie Kraly represented DHSS.

Elections

Alaska Independence Party v. State. The Ninth Circuit issued its opinion this month. The Court upheld Alaska's primary system against an associational rights challenge by the Alaska Independence and Alaskan Libertarian Parties. The parties claimed that Alaska's mandatory primary violated their associational rights by not permitting them to de-select from participation in their primary any candidates with whom the party disagreed ideologically. The Court found Alaska's primary to be an appropriate and fair mechanism to resolve intra-party differences over a party's choice of its standard-bearer. It also concluded that Alaska's primary system withstood the highest standard of review—strict scrutiny—because the state's interest in eliminating fraud and corruption in the selection of party candidates is compelling and the primary is narrowly tailored to serve that interest. AAG Mike Barnhill represented the state.

Alaska Public Offices Commission v. Ben Stevens. AAG Margaret Paton-Walsh filed a brief with the Alaska Supreme Court on September 30 in the Alaska Public Offices Commission's (APOC) appeal from the superior court's reversal of its assessment of a fine against former state Senator Ben Stevens. The issue is whether income that is deferred should be reported in the year it is earned or in the year it is paid out. APOC takes the position that the earnings were an asset to be reported when the funds were deposited into the Senator's deferred account, rather than when the funds are eventually withdrawn.

Kolhaas v. State, Kolhaas II. This month AAG Sarah Felix filed the appellee's brief with the Alaska Supreme Court in this case, concerning an appeal from the Lieutenant Governor's refusal to certify an initiative application proposing an advisory vote on whether the laws and constitutions should be changed to allow Alaska to secede from the United States.

Employment

State v. EEOC. On September 24, AAG Brenda Page argued before an *en banc* panel of the Ninth Circuit Court of Appeals in San Francisco in this case. The section prevailed in this matter in front of a three-judge panel. The panel majority held that sovereign immunity barred the 1994 discrimination and retaliation claims brought by Ms. Ward and Ms. Jones against the Office of the Governor, but the decision included a detailed and strong dissent. In seeking en banc review of the decision, the Equal Employment Opportunity Commission (EEOC) and Ms. Ward raised for the first time a recent United States Supreme Court decision, *U.S. v. Georgia*, in which the Court held that, when a plaintiff in a Title II Americans With Disability Act case alleges an actual constitutional violation, Title II abrogates sovereign immunity. In oral argument, the Court primarily focused on the scope of the *Georgia* decision. The case is pending decision.

DeNardo v. State, Vaughn et al. and Denardo v. State, Day et al. The superior court dismissed two actions brought by *Daniel DeNardo* against the state for its failure to hire him when he applied for positions. The actions were dismissed due to Mr. DeNardo's failure to pay filing fees or, alternatively, to provide information showing he was entitled to exemption from payment. AAG Brenda Page is representing the state defendants in these two cases.

Employment Security

Stockheim v. Salvation Army. On October 20, Judge Stowers issued his decision. In this case, a former employee appealed the denial of the initial six weeks of compensation benefits, which had been denied on the basis that the employee had voluntarily left employment without justification. The court concluded that substantial evidence supported the appeal tribunal's findings. AAG Larry McKinstry handled this administrative appeal for the Department of Labor and Workforce Development.

Public Records

The section spent a lot of time this month responding to public records requests prompted in part by interest in the state following the Governor's candidacy for vice president. The requests have come from all over the country, both from the media and from individuals. One request was accompanied by a complaint and motion for a temporary restraining order, *McLeod v. Palin*. Judge Stowers issued an interim order for the preservation of certain emails in the *McLeod* case, and the case is on-going. AAG Mike Mitchell represents the state. AAG Brenda Page also has been involved with records requests.

Motor Vehicles

Graham v. DMV. This month Judge Joannides issued a fees and costs award against the state. Earlier, Judge Joannides had remanded this appeal to the Division of Motor Vehicles (DMV) after concluding that Mr. Graham's right to confront witnesses against him was violated when a hearing officer did not grant a request for the arresting officer to appear at the hearing in person, rather than by telephone. Mr. Graham asked for full fees of \$8,250 and full costs of \$2,740. The judge awarded Graham 30% of his fees—\$2,750 and \$1,194.10 in costs. AAG Krista Stearns represented DMV in this matter.

Retirement and Benefits

Alford v. State. On October 16, the Alaska Supreme Court issued its decision. This appeal was brought by members of the Public Employees Retirement System who took early retirement before 1977, returned to work, and then retired a second time. The retirees contested the calculation of their benefits on constitutional grounds. The case was a win for the Division of Retirement and Benefits: the Court affirmed the Division's methodology. Former Assistant Attorney General Gina Ragle handled this case.

Workers' Compensation Appeals Commission

On October 24, the Alaska Supreme Court issued its opinion in *Edward Barrington, D.C. v. Alaska Communications Systems Group, Inc.* This is the first opportunity the Court has had to review an appeals commission case since the commission began its work in November, 2005. The appeal was from an unpaid medical provider whose patient settled a compensation claim without notifying (or paying) medical providers. The commission participated in the appeal to protect its status as the final administrative decision-maker in worker's compensation claims. The patient/workers' compensation claimant had argued that review was of the Alaska Workers' Compensation Board's decision, and the commission asked the Court to rule that its decision was the decision on review. The Court agreed, concluding that commission decisions were binding precedent for the board and commission and that the commission decision was the final administrative action in a workers' compensation case. The Court also concluded that the commission was not automatically a party in appeals from its decisions.

Although a court rule provides that administrative agencies are parties to appeals of their decisions, the Court found that the rule did not apply to the commission because its appeals bypass the superior court and go directly to the Supreme Court. The Court did agree that government had a role in the appeal but, instead, concluded that the Director of the Division of Workers' Compensation should represent its interests. Finally, on the merits, the Court applied the independent judgment standard and reversed the decision, concluding that a medical provider must receive notice of the settlement of a workers' compensation claims before the settlement binds the provider. AAG Krista Stearns represented the commission.

Legislation and Regulations

During the month, the section was busy opening the first set of legislation drafting files for the Governor's Office. Additionally, the section edited and legally approved for filing the following regulations projects: 1. Department of Commerce, Community, and Economic Development (nursing courtesy license fees; Alaska Climate Change Impact Mitigation Program grants); 2. Board of Nursing (nursing faculty, licensure, continuing education, administrative of non-herbal nutritional supplements, etc.); 3. Department of Natural Resources (Knik River public use area and other public use areas); 4. Department of Environmental Conservation (air quality and standard permit conditions); 5. Alaska Oil and Gas Conservation Commission (suspended wells and requests for information); 6. Department of Health and Social Services (emergency regulations made permanent re: Medicaid payment for lung transplants; emergency regulations made permanent re: Alaska heating assistance program); 7. Commercial Fisheries Entry Commission (forms and fees).

Natural Resources

University Land Grant Litigation

AAG Anne Nelson participated in oral argument before the Alaska Supreme Court on October 6. This case addresses whether the conveyance of approximately 260,000 acres of state land to the University of Alaska's endowment trust creates an unconstitutional dedicated fund. The Alaska Constitution prohibits the dedication of "the proceeds of any state tax or license" to a special purpose. Environmental organizations Southeast Alaska Conservation Council (SEACC) and Tongass Conservation Society (TCS) have challenged the legislation on the grounds that any revenue generated by the university's management or sale of the land constitutes "proceeds of a state tax or license" that is impermissibly dedicated to the university's endowment trust.

The state and university argued that the university is entitled to the revenue from land that it owns because the Alaska Constitution authorizes the university to hold title to real property. The state and university prevailed in the trial court on cross-motions for summary judgment, and SEACC and TCS appealed. The parties await the Court's decision.

Estate of David Miller v. CFEC

The Ketchikan Superior Court affirmed the Commercial Fisheries Entry Commission's (CFEC) denial of an application for a limited entry permit for the Northern Southeast Inside sablefish longline fishery, which application was filed by the Estate of David Miller. Mr. Miller died a few months before the qualification date for the fishery, and the application filed by his estate was based upon his qualifications up to the date of his death.

The court held that the terms of the Limited Entry Act, which provide in part that "[t]he commission shall accept applications for entry permits only from applicants who have harvested fishery resources commercially while participating in the fishery as holders of gear licenses . . . before the qualification date," do not require the commission to accept an application from the estate of a fisherman who died before the qualification date for the fishery. The court found that the act defined "person" to mean a "natural person" for purposes of the Limited Entry Act, and that the Act used "person" and "applicant" interchangeably, thus reflecting the Act's intent that "applicant" mean "person." Therefore, it upheld the commission's decision that because an estate is not a person, it is not a qualified applicant.

The court found that this was supported by the plain language of the statute, which required "applicants" to have "harvested fishery resources commercially while participating in the fishery as holders of gear licenses," which an estate applicant could not have done. The court also found that the estate waived its arguments that a regulation, 20 AAC 05.530(d), is

unconstitutional, and even if it hadn't waived those arguments, the constitutionality of that regulation was not an issue that the court needed to decide in this case. AAG Colleen Moore represented the CFEC.

Rehearing Denied in Carlson IV

The Alaska Supreme Court denied the plaintiffs' petition for rehearing in *Carlson IV*, an April 11, 2008 opinion holding that the actual differential between what the state charged residents and nonresidents for commercial fishing permits and licenses was not justified and, therefore, unconstitutional, but that a margin of error of up to 50 percent was permissible as only incidental rather than substantial inequality.

Oil, Gas, and Mining

The section advised the Departments of Natural Resources (DNR) and Revenue (DOR) on multiple public information requests related to the natural gas pipeline, and reviewed the public records for privilege. The section is also advising DNR and DOR on legal issues relating to implementation of the AGIA license and moving forward to the open season where producers commit to ship gas on the pipeline. The section also continues to advise DNR on legal issues relating to gas storage in the Cook Inlet region.

Opinions, Appeals and Ethics

AAG Judy Bockmon addressed a variety of informal ethics inquiries by email and phone on a regular basis. She prepared a written advisory letter for a former state employee and sent a non-confidential opinion to the Palmer Soil and Water Conservation District addressing conflict disclosure procedures and interests in contracts.

AAG Bockmon also transmitted two ethics complaints to the Personnel Board for hire of independent counsel and responded to related

activity. She also concluded one investigation, and initiated another in a matter referred from the Department of Military and Veteran's Affairs. AAG Bockmon is also working on an advisory opinion addressing a certain board member's disclosures.

A significant portion of AAG Bockmon's time in the past two months has been devoted to addressing questions relating to various ethics matters as a result of the Governor's selection as the Republican vice presidential candidate. She was asked to brief the Governor's staff on ethics issues in the context of political campaign activities on September 3 and has answered numerous individual questions from the Governor's staff. She also provided general guidance to the ethics supervisors regarding the Ethics Act related constraints on state officers taking leave to campaign. She has talked to numerous media representatives and has provided guidance on some public records requests made to other agencies.

Appeals and Litigation

In the Matter of the Guardianship of Lorraine McGregory, S-12597. The Alaska Supreme Court issued its decision this month, resolving the case in the state's favor. The appeal raised the question of whether Civil Rule 82 applies in guardianship proceedings. The Supreme Court found that it would be inconsistent with its decisions finding that Rule 82 does not apply to child-in-need-of-aid (CINA) proceedings and civil commitments, to find that Rule 82 could be routinely applied to guardianship petitions initiated by the state. The Court found that application of the rule to award fees to prevailing parties would be inconsistent with the unique character and protective nature of guardianship proceedings initiated by the state.

The Supreme Court also relied on the policy expressed by the legislature in AS 13.26.131. That statute expressly provides that a respondent is ultimately responsible for the costs of appointed counsel, an expert retained to testify

on the respondent's behalf, an appointed guardian ad litem, and other guardianship costs. The statute contains two exceptions: financial hardship, AS 13.26.131(c), and cases where the petition initiated was malicious, frivolous or without just cause. AS 13.26.131(d). The superior court addressed the latter exception and found the department's petition to be none of those things. The Court left open the question of whether the costs of privately retained counsel—which was the situation in this matter—would fall under AS 13.26.131 as “other guardianship costs.” The Supreme Court noted that if the AS 13.26.131(d) exception did not apply to cases with privately retained counsel, that it would not interfere with the unique character of the guardianship proceedings to allow the award of full fees under Civil Rule 82 for vexatious or bad faith conduct or for cases that are malicious, frivolous or without just cause.

On the facts of this case, the Court upheld the superior court's finding that the petition initiated was not malicious, frivolous or without just cause. Accordingly, the Supreme Court affirmed the superior court's judgment denying any fee award. AAG Laura C. Bottger represented the Department of Health and Social Services (DHSS) in this appeal. Former AAG Beth Russo represented DHSS before the trial court.

W.S.B. v. Alaska Psychiatric Institute, S-13015. Alaska Psychiatric Institute (API) filed its appellee brief in this appeal in which W.S.B. challenges the superior court's refusal to grant his request to make public the court file from his civil commitment proceedings. In its briefing, API noted that the superior court did not err in treating the court file as confidential given the statutory scheme, court rules, and court administrative practice. API also argued that whether to make public the confidential court file is a matter of discretion for the trial court, as there is no constitutional right of public access to the court records from civil commitment proceedings. API contends as well that the trial court did not abuse its discretion in refusing to treat as conclusive W.S.B.'s request to

permanently make public the confidential court file where W.S.B. was not exercising informed consent or acting in concert with the guardian appointed to protect his best interests, API considered opening the file potentially injurious to his therapeutic needs, and W.S.B. was not restrained from speaking about his circumstances. AAG Laura C. Bottger represents API in this appeal. Former AAG Beth Russo represented API below.

J.S. (father) v. OCS, S-13066. The Office of Children's Services (OCS) filed its appellee's brief this month in an Indian Child Welfare Act case in which a father's parental rights were terminated. On appeal, the father, who has a long history of substance-abuse related criminal acts including domestic violence assaults against the child's mother (the mother did not appeal the termination of her parental rights based on her own unresolved substance abuse issues) and a revolving-door pattern of incarcerations, challenged the trial court's findings that (1) his conduct placed his child at risk of harm, (2) he did not remedy the conduct that endangered the child, (3) OCS made active efforts to preserve the Indian family, (4) the child would likely suffer serious harm if returned to the father, and (5) termination of the father's parental rights was in the child's best interests. The child was removed from the home at only five weeks of age. The father did little toward his case plan for eight months, whereupon OCS filed a termination petition. The father then worked his case plan for a few months, but his therapist testified that his issues would take a very long time to address and he was not yet ready to even begin the necessary substance abuse treatment. A few weeks before the termination trial the father, upon receiving some bad news, blew up in a therapy session, threatened the life of his social worker, and cancelled all future sessions.

The father's numerous arguments on appeal consist basically of assertions that he never endangered his child because the child was not around when he was doing bad things, he no

longer poses a danger to the child because by the time of the trial he had been sober and out of jail for a few months and had been interacting appropriately with the child during supervised visits, and OCS should give him more time to address his issues. OCS argues that the child would be in serious danger if returned to the father, who is not even close to having remedied his dangerous conduct, and that the child cannot afford to wait for the father to become ready to act as a parent. AAG Mike Hotchkin prepared the brief on appeal.

K.B. v. State, OCS, S-13083. The appeal involves a child-in-need-of-aid case that was initiated in August 2006 after the mother (who was intoxicated and depressed) called 9-1-1 to report that she intended to kill her two young sons. Over the next year-and-one-half, OCS worked with the mother to remedy her mental health issues, alcoholism, and anger-management issues. It also worked with the children and their foster parents to address the boys' developmental delays and emotional and behavioral issues, which were the result of their prior exposure to alcoholism, domestic violence, and parental mental health problems.

Approximately one year into the case, the mother began to address her numerous issues, but even then progress was very slow. And her relationship with her sons remained distant, with no evidence of a healthy parent-child bond. In fact, the boys often shied away from her and, when contact increased, their behavior began to regress. As a result, in April 2008, the trial court terminated the mother's parental rights to her sons, who were three and two at the time. This freed the boys for adoption by their foster parents, with whom the children were clearly bonded. AAG Megan Webb prepared the brief on appeal.

B.M. v. State, OCS, S-13090. This appeal involves a child-in-need-of-aid (CINA) case, in which a father's parental rights to his daughter were terminated. The Office of Children's Services (OCS) became involved with the family

in July 2005, when it learned that their newborn baby had been exposed to drugs *in utero*. Unable to place the baby with her father, who was briefly incarcerated, OCS assumed custody and placed her in foster care. Based on the father's subsequent participation in services and supervised visits with the baby, OCS placed the child back in the home. With the assistance of OCS, the father was able to care for the baby for several months. But when he began enabling the mother's drug addiction and endangering the safety of the baby, OCS again removed the child from the home. After that, the father refused to cooperate with OCS or to participate in services designed to reunify the family. Over the next two years, he would routinely disappear, only to reappear in jail. While incarcerated, he would cooperate and communicate with OCS and participate in visits with his child; when released, such cooperation, communication, and visitation would cease. By the time the child was two-and-a-half, she had been in OCS's custody for most of her life, had been in a pre-adoptive placement for almost a year, and had gone through two separate six-month periods in which she had had absolutely no contact with her father. As a result of the father's conduct and the risk of harm he posed to the child, the trial court terminated the father's parental rights. The father appealed that order. AAG Megan Webb prepared the brief on appeal.

Heitz, et al. v. State of Alaska, OCSS-13036.

The Office of Children's Services (OCS) filed its appellee brief this month in a foster mother's appeal of the recoupment of foster care subsidies, i.e., overpayments. On appeal, the foster mother, on behalf of herself and all those similarly situated, challenged the superior court's finding that foster care parents: (1) do not have a "protected property interest" in foster care payments; and (2) are not entitled to procedural due process protections, including adequate notice and the opportunity to be heard, before foster care payments may be constitutionally terminated, reduced or recouped by the state. OCS defended this decision,

arguing that while foster children may have a "protected property interest" in foster care payments, any interest that foster parents have in foster care payments, benefits and/or subsidies is minimal and insufficient to trigger due process protection. AAG John Erickson, Jr., prepared the briefing on appeal.

L.W. v. State, S13072. The father appealed from the termination of his parental rights. L.W. first came to the Office of Children's Services' (OCS) attention because of possible sexual abuse of his daughter. However, OCS's attention had quickly turned to L.W. frequently leaving his daughter (starting when she was only five-years-old) home alone at night, locking his daughter up in the bathroom for discipline, L.W.'s odd behaviors and lack of interaction with his daughter during visitation, and concerns about L.W.'s scizotypal personality traits. L.W. argued that the trial court had incorrectly referred to the daughter as having Fetal Alcohol Syndrome and brain impairment. The state argued that the court's references were not completely incongruous with the daughter's medical diagnosis, and the focus of the trial court was absolutely right -- the daughter was a special needs child and L.W. would not be able to effectively parent her because of his own issues. L.W. also argued that his "conduct" would not cause his daughter serious emotional or physical harm. Under Indian Child Welfare Act (ICWA) section 1912(f) the state has to prove that "the parent's conduct is likely to harm the child" and that the parent is unlikely to change her conduct. L.W. argued that his difficulties were his personality traits, not "conduct" and therefore the ICWA 1912(f) finding (that his continued custody is likely to result in serious emotional or physical damage to the child) had to be overturned. It is the state's position that L.W.'s personality traits result in an array of odd behaviors and home conditions, and those odd behaviors and home conditions would cause his daughter serious emotional or physical harm. AAG Mary Lundquist prepared the briefing for this appeal.

Dennis v. State, Bureau of Vital Statistics. In this superior court case, Mr. Dennis is asking the Bureau of Vital Statistics to issue a new birth certificate with his name on it based on a tribal order of paternity. The tribe had issued an order finding that Mr. Dennis was the child's father and had ordered the state to issue a new birth certificate. The Bureau had issued a birth certificate with the mother's husband's name on it. Under state statutes, the name of the husband (during the term of the pregnancy or at the time of the birth) is entered onto the birth certificate unless the husband's paternity has been disestablished or the parties complete affidavits acknowledging paternity.

It is the state's position that Mr. Dennis should have pursued the birth certificate issue in an ongoing superior court case where he had appeared as the child's father. In the alternative, even if it was appropriate for the Central Council of the Tlingit-Haida Indian Tribes of Alaska to have acted on the paternity issue, a state court needs to perform a comity analysis to ensure that the tribe had subject matter jurisdiction, personal jurisdiction over the parties, and that the due process rights of the parties were complied with. A decision is expected by the superior court in two-three weeks. AAG Mary Lundquist is handling this case.

Other Matters

During October, AAGs Dave Jones and Laura Bottger assisted the Office of the Governor and several other agencies with responses to the extraordinary number of requests for public records they received in the last two months. AAG Dave Jones also assisted in representing seven state employees who received subpoenas as part of the legislative investigation concerning former Commissioner Monegan's removal. AAG Peter Putzier participated as a panelist during a Tribal Transportation Summit held at the Egan Center in Anchorage on October 20-21. The summit focused on the Indian Reservation Roads program and on possible long term state-tribal transportation relationships. One of the

goals of the summit was to craft a model maintenance agreement whereby tribes could take over state maintenance duties, on state managed roads, using federal transportation dollars. While no agreement has yet been reached, the tribes and the state continue to work on resolving outstanding jurisdictional, hiring preference, and liability issues. AAG Jeff Wildridge from the Transportation Section is working with AAG Putzier and also attended the summit.

Regulatory Affairs and Public Advocacy **(RAPA)**

Public Advocate Advisory Issued

U-07-144, Adak telephone rate reduction and refunds. On October 9, the Attorney General/RAPA issued a Public Advocate Advisory through the Governor's press office: "*Attorney General's Office Negotiates Rate Reduction and Refunds for Adak Telephone Consumers.*" The advisory explains that a stipulated settlement recently approved by the Regulatory Commission of Alaska provides for a one-time 33 percent rate refund (approx. \$56,000 in total) to individual Adak ratepayers for local rates paid during 2008, and a 57 percent rate reduction in permanent local telephone rates going forward.

Pleadings Filed

U-08-25/Enstar post-hearing brief. This case arose out of informal complaints from Enstar Natural Gas Co. (Enstar) customers who asserted that they are due refunds because of a reclassification of service (relating back to a 2003 approved rate design) that should apply to them under the utility's tariff. Enstar sought reconsideration of a commission decision ordering refunds to any customer who turned in a rate adjustment after the closure of a prescribed notice period deadline. On August 18, 2008, a hearing was held on reconsideration for the purpose of taking additional evidence from the utility and argument from both parties.

On September 29, RAPA filed the Attorney General's post-hearing brief which advocated that the commission should deny Enstar any relief on reconsideration and should clarify that the ordered refunds extend to all present and former customers under the preferred tariff rate. The Attorney General/RAPA brief (by AAG Glenn Gustafson) argued that applicable law supports the commission's order of refunds under the circumstances notwithstanding utility assertions regarding retroactive ratemaking and the filed rate doctrine.

U-07-116/161, Copper Valley Telephone post-hearing brief. Copper Valley Telephone Cooperative (CVTC) proposes to increase local rates in its noncompetitive exchanges as an offset to anticipated price decreases in its competitive exchanges, such as Valdez where GCI has entered the market. An adjudicatory hearing was held on September 8-9 at which both parties presented and cross-examined respective witnesses.

The Attorney General's post-hearing brief (by AAG Glenn Gustafson) was filed under seal on October 13. The Attorney General/RAPA argued that the requested rate increases were not supported by the record, and also that the utility's operating results in Valdez (the competitive exchange) may legally be considered in setting rates for the noncompetitive exchanges. Further, the Attorney General brief maintained the recommendation for a 10 percent per annum rate increase cap in the noncompetitive exchanges.

U-07-76/77, GHU/CUC petition for reconsideration. Golden Heart Utilities (GHU) and College Utilities Corp. (CUC) are investor-owned utilities (organized under a holding company) that provide water and wastewater services in Fairbanks. This case is the third filing by the utilities in as many years that seeks rate increases for both services. A four day adjudicatory hearing was held in Fairbanks in March 2008, followed by the filing of post-hearing briefs in April. On September 25, the Attorney General/RAPA filed an opposition to the

utilities' petition for reconsideration of the commission's decision.

On October 16, the Attorney General/RAPA filed its own petition for reconsideration of the commission's decisions in the case, including the particular amortization of prior utility rate case expense, the allowance for pass-through of unsynchronized net plant additions going forward, the allowance for changes in transportation costs on a going-forward basis, and the inclusion of unsupported, incidental employee benefits. In the petition (by AAG Sam Cason), the Attorney General/RAPA argued that the commission decisions on these issues ignore longstanding ratemaking principles embodied in statute and regulation, as well as in its own precedent.

Appellate Oral Argument

Supreme Court No. S-12788 (3AN-05-11721/RCA No. U-04-22/23), AWWU v. RCA. This matter is before the Alaska Supreme Court on further appeal by the Municipality of Anchorage d/b/a Anchorage Water and Wastewater (AWWU) from the superior court ruling upholding the Regulatory Commission of Alaska (RCA) below. The issues on appeal concern the RCA's disallowance of AWWU's proposal to include in consumer rates a \$6 million increase in the Municipal Utilities Services Assessment (MUSA) that the municipality assessed against its water and wastewater utilities.

On October 8, Senior AAG Steve DeVries, who litigated the RCA administrative case and handled the superior court appeal below, presented the Attorney General/RAPA's oral argument before the Alaska Supreme Court.

Torts and Workers' Compensation

The Ninth Circuit Court of Appeals reversed the trial court in an action under 42 U.S.C. sec. 1983 brought by the parents of Casey Porter, who was fatally shot by an Alaska State Trooper in 2003. The Porters claim that the shooting

violated their rights under the 14th Amendment's Due Process Clause to the continued companionship and association with their independent adult son. In an interlocutory appeal, the Ninth Circuit reversed the trial court (which had imposed a "deliberate indifference" standard) and held that the legal standard of culpability to be applied is whether the officer acted with a purpose to harm for reasons unrelated to legitimate law enforcement objectives. This standard applies to situations where an officer is faced with a quickly evolving set of circumstances prompting the need to make "split-second decisions." The case is remanded to the trial court for further proceedings using the proper standard. AAG Ruth Botstein handled the interlocutory appeal and will continue to represent the trooper in the trial court.

The section lodged a petition for review with the Alaska Supreme Court on whether state employees sued in their individual capacity, who evaluate and score responses to competitive procurements, are entitled to absolute immunity from suit for performance of certain procurement functions, such as evaluating and scoring subjective components of competing offers. After the trial court in Fairbanks refused to stay the trial court proceedings, the Supreme Court granted a limited stay until November 28. The trial court matter is being defended by AAG Gene Gustafson in the Fairbanks office.

Transportation

Juneau Access Case Continues On Track

Environmental groups opposing a 50-mile extension of road north of Juneau to a new ferry terminal near the Katzeihin River moved to amend their initial complaint to add new counts alleging the project improperly impinged on parkland. The U.S. District Court denied the motion to amend. Section Chief Jim Cantor and AAG Peter Putzier represent the state as intervenors in this federal litigation.

Linny Pacillo Garage Opens

The Linny Pacillo parking garage opened across the street from the Atwood Building in Anchorage. AAGs Joan Wilson, Jeff Stark and Section Chief Jim Cantor assisted with land acquisition and construction issues since this project's inception.

Congress Creates Pilot Program

Congress created a pilot program allowing Alaska and four other states to assume some of the duties the Federal Highways Administration performs under the National Environmental Policy Act (NEPA). In an important step towards assumption, the state and the Federal Highways Administration concluded their negotiation of a memorandum of agreement that will allow the state to determine if individual projects are categorically excluded from full NEPA analyses. The proposed memorandum of agreement has been published in the Federal Register for public comment. AAGs Peter Putzier, John Steiner and Section Chief Jim Cantor contributed to this effort.

Court Awards Possession Of Land

To obtain a narrow strip of land owned by a condominium association, the Department of Transportation and Public Facilities (DOT&PF) had to file suit against the more than three hundred people and entities with property interests in the condominium development. The court has now granted DOT&PF possession of the land, allowing construction of the East Dowling extension project to proceed. AAG Susan Urig represents DOT&PF.

One-sided Trial Proceeds Without Defendants

The state sued the builder of a Fish and Game enforcement vessel because the vessel was unstable and needed to be re-built. In an unusual proceeding, neither the builder nor its surety attended the trial of the state's damages claims. AAG Rick Welsh presented the state's case, with no opposition from the defendants.

Security Cases Settle

AAG John Steiner helped the Ted Stevens Anchorage International Airport settle three enforcement actions brought against it by the Transportation Security Administration (TSA). The TSA alleged the airport allowed its tenants to breach security.

Public Weighs In

AAG Jeff Stark attended public hearings in Petersburg, Ketchikan, Juneau, Sitka, Dillingham, Bethel, Nome, Kotzebue, Willow, Fairbanks, and Anchorage concerning proposed fee increases at rural airports.

Supreme Court Hears TB Test Case

Section Chief AAG Jim Cantor argued a non-transportation case before the Alaska Supreme Court concerning the state's tuberculosis testing program. Parents contested the state's statutory and constitutional authority to require that their school-aged children receive a particular test designed to detect latent tuberculosis infection.

CRIMINAL DIVISION

Anchorage

Anchorage and Dillingham conducted 9 trials and 44 grand juries during the month.

New ADAs Melissa Wininger-Howard and Josh Kindred got their "first wins". ADA Wininger-Howard prosecuted a case against a man who made threatening gestures toward a pair of police officers. ADA Kindred prosecuted a man for drunk driving.

ADA Clint Campion, new to the office, though not new to prosecution, got his first two wins – against a recidivist thief and a domestic violence batterer.

ADA Rob Henderson completed the long saga of Tadd Sheffield, a 2006 case involving guns and drugs.

ADA Taylor Winston tried Douglas Artemie for the brutal "fisting" rape of a woman who he'd just met that evening. The assault took place in her home. She testified that the self-absorbed Artemie combed his hair and primped in the mirror while she sat bleeding. Only surgical intervention saved her life. The jury found that the sexual assault was "most serious" within the class of offense. Since the crime was old (this was a retrial after a hung jury and an appeal of the trial judge's decision to mistry the case after only 6 hours of deliberations), the sentencing range is 8 to 30 years.

ADA Ben Hofmeister went to sentencing on a case he tried over the summer. Annie Shinnault was a 3-time convicted felon and sentenced to 55 years for the kidnapping, sexual and physical assault of a prostitute who had stolen drugs from a co-defendant of Shinnault's.

Fairbanks DAO

A 28-year-old Fairbanks man was sentenced to a composite 12 years in prison with 4.5 years suspended, following his pleas to manslaughter and driving while under the influence. This defendant had no prior criminal history at all, but made the very unfortunate mistake in judgment to attempt to drive after having consumed alcohol. He ended up killing his best friend, who was his passenger, in a one car roll-over accident outside Denali Park. After his release from prison, this defendant will be on probation for three years. As part of his probation conditions he has agreed that he will make a presentation with the victim's father available to every middle school and high school in the Fairbanks-North Star School District regarding the tragedy's of drinking and driving and the tragic results that can occur.

A 20-year-old Fairbanks man was sentenced to 3 years with 1 year suspended for assault in the

second-degree consecutive to two and one-half years with 1 year suspended for failure to render assistance following a one car accident in which he was driving too fast and failed to negotiate a left-hand turn and struck a utility pole. This driver fled the scene leaving his seriously injured passenger in the car unattended prior to the police responding. Although he did not take the time to assess his passenger's injuries or render medical assistance, he did take the time to remove the Alaska license plates from the car in an attempt to hinder the police investigation that he knew would follow. Emergency room physicians testified the passenger would have died from his internal injuries had he been transported as little as 10 minutes later to the emergency room. Although the defendant was not located in time to administer a meaningful breath test, he was nonetheless charged with driving under the influence based on anecdotal evidence that he had been drinking prior to the accident and sentenced to an additional 20 days to serve upon his plea to that charge. Charges of felony tampering with evidence and reckless driving were dismissed upon his plea to two felony charges and the DUI of which he was convicted.

A 22-year-old Fairbanks man was sentenced to 5 years with 2 years suspended following his plea to his second felony DUI, having been convicted of his first felony DUI in 2006. Just this year Fairbanks has seen about 10 convictions for subsequent felony driving while under the influence convictions, including one third time DUI felony, and two defendants convicted of their fourth felony DUIs. Serious consideration needs to be given to making a second, or certainly a third, felony DUI conviction a B felony instead of a C felony as it is currently classified. With a certain percentage of drunken drivers it is apparent that the only way they are going to stop drinking and driving is to isolate them from the public by keeping them in prison for longer and longer periods of time.

A 57-year-old Fairbanks man was sentenced to 5 years with 2 years suspended following his

conviction for domestic violence assault in the third-degree for using his hands to strangle his girlfriend of six months. Although his acts did not in-fact cause serious physical injury to the victim, he was convicted for causing any physical injury by means of a dangerous instrument, namely using his hands to impede his victim's airway and to impede her breathing. Based on his conviction in the new charge this defendant was additionally sentenced to 2 years and 11 months in a petition to revoke his probation for a prior conviction for second-degree assault in 1999. The two sentences are to be served consecutively. In all, this man had five prior felony and misdemeanor convictions for assault, and his composite sentence of 5 years and 11 months to serve was certainly justified although his victim in this instance was in-fact not seriously injured.

Cases brought before the grand jury during the month of October included multiple unclassified felonies including attempted murder, sexual abuse of a minor in the first-degree, and kidnapping. All told 53 persons were indicted for new felonies during the month of October.

Kodiak DAO

Business in the Kodiak DAO remained steady throughout the month of October.

A local village man was arrested for driving under the influence when he stopped his truck to offer a visiting Alaska State Trooper a ride. Hours after the arrest his breath alcohol concentration still exceeded the legal limit.

An Old Harbor man was indicted for pulling a knife on a couple in their home.

An Ahkiok man was arrested and charged with felony assault after it was reported he struck another village resident in the head with a rock.

A Kodiak woman was arrested and indicted for multiple counts of forgery and theft after an investigation revealed the misappropriation of

multiple rent payments for properties managed by a local real estate company.

An off island man was indicted for burglary and theft arising from the theft of a laptop computer from a fishing boat moored in the harbor. Police were called to the harbor by citizens who had confronted the defendant after seeing him board the vessel in darkness and leave.

A number of set fires continue to be investigated by island law enforcement. In addition, Alaska State Troopers are investigating a felony criminal mischief after a Department of Transportation and Public Facilities bulldozer was driven into the ocean off a local beach where it had been parked overnight.

Judge Peter Ashman has been assigned pro tem to the Kodiak Superior Court until May to serve following Judge Bolger's departure from the island to the Court of Appeals.

Jury selection in a sexual abuse of minor case will begin before Judge Ashman the last week of the month.

Kotzebue DAO

Arthur Nelson was sentenced to serve 17 years with 2 years suspended and 5 years of probation following his mid-trial plea to attempted sex abuse of minor in the second-degree. This was Nelson's third felony conviction, second sex felony conviction. Nelson, 28-years-old, had been drinking at a friend's house and snuck into the room where a fourteen-year-old girl was sleeping. He claimed he was looking for headphones for his I-pod and that was the reason he put his hand inside the girl's pajama bottoms.

On October 3, Bert Flood was sentenced to serve 50 years with 5 years suspended and ordered to 25 years of probation following a trial where the jury convicted him earlier this year of sexual abuse of a minor in the first-degree,

sexual abuse of a minor in the second-degree, and incest for sexually abusing his then 15-year-old daughter. This was Flood's third felony and second sex felony conviction. He will have no good time on the 45-year active jail sentence. He will be time-served when he is 94-years-old.

Also on October 3, 35-year-old David Foster of Noorvik was sentenced to serve 30 years jail with 10 years suspended following a guilty plea earlier this year to sexual abuse of a minor in the first-degree. Though it was Foster's first felony conviction, he had been sexually abusing his 12-year-old step-sister weekly over a two-year period. Foster confessed to Alaska State Troopers about the most recent sexual assaults.

Nome DAO

Last October in Teller, after a night of drinking, Eli Dickson went to the home of an ex-girlfriend, Maggie Komok, and went to sleep on the bedroom floor. Komok's spouse, Patrick "Rudy" Pushruk was also intoxicated when he came home and found his rival asleep in his bedroom. This upset Pushruk, who then kicked Dickson repeatedly in the head. Pushruk then left his home. Sometime later, Komok and her brother showed Dickson out the door. Dickson saw Pushruk outside at a next door neighbor's house and confronted him. Dickson then pulled Pushruk to the ground and kicked and stomped Pushruk's head until he crushed his skull. For this, Dickson pled guilty to manslaughter and admitted that his conduct was most serious. Sentencing was held October 21. The sentencing court agreed that the offense was most serious, but also found that Pushruk had substantially provoked Dickson and imposed only a moderately aggravated sentence of 16 years with 5 suspended. The court also directed, however, that Dickson not live in a community without police until he had successfully completed anger management.

Palmer DAO

Dana Spindler was found guilty after a three-day bench trial before Judge Kari Kristiansen of sexual abuse of a minor in the second-degree and indecent exposure in the second-degree. In 2007, Spindler visited a friend in Wasilla and stayed the night after drinking. During the early morning hours, he made his way into the friend's bedroom, where the friend, his eight-year-old daughter and his girlfriend were sleeping. Spindler touched the child underneath her underwear and masturbated. The child's father and girlfriend woke up, kicked Spindler out and called the police. Alaska State Troopers found the defendant walking down the street. Spindler admitted touching a female, but said he thought he was touching the adult girlfriend. At trial, Spindler's attorney filed an affirmative defense of mistake of fact, maintaining the defendant believed he was touching an adult female. Spindler testified at trial that he could not recall anything that happened in the bedroom. The judge found that the defendant could not have possibly mistaken an eight-year-old girl for an adult woman. Because of prior convictions, Spindler faces a minimum sentence of 20 years in prison. ADA Kerry Corliss prosecuted this case.

Palmer District Court Judge Greg Heath sentenced Arthur "Sammy" Larue to serve one year for assault in the fourth-degree on his live-in girlfriend's toddler. Defendant Larue taped himself swinging a door into the boy and knocking him across the room. At sentencing, the prosecutor also showed videos of the defendant selling drugs out of the home. Judge Heath found the crime to be a "worst offense," despite Larue not having any prior convictions. The prosecutor was ADA Mike Perry.

October was a busy trial month in Palmer District Court.

Michael Hollstein was convicted after a jury trial on the charge of driving under the influence, a second offense. The case was three-years-old

due to various motion work that had taken place. However, due to the age of the case, the audio had been destroyed. The defense focused on the fact the defendant passed the walk and turn and one leg stand portions of the field tests. However, the jury convicted him in large part due to the blood alcohol content (BAC) being .091. The defendant took the stand and claimed he would not drive drunk. The judge allowed the defense to clarify that the defendant would not drive drunk now due to his having changed in the last few years instead of allowing the state to introduce his prior DUI conviction. ADA Shawn Traini was the trial prosecutor.

Shannon Wolverton was convicted by a Palmer jury of DUI. The case was about three years old. She called the police from home reporting that she had been assaulted. The investigation revealed that she got angry while at a bar, left the bar and drove herself and others home. During the investigation, Wolverton admitted to police that she drove home from a bar. At trial, the defense argued that she was too drunk to tell the truth at the time. The jury believed her statements made at the time rather than her new story at trial. ADA Mike Perry was the trial prosecutor.

Justina Gostevskyh was also convicted, after a jury trial, of DUI. The trial prosecutor was ADA Alison Collins.

Another jury convicted Byron Leu of assault in the fourth-degree and misconduct involving a controlled substance in the sixth-degree. ADA Jarom Bangerter was the trial prosecutor. Brandon Dodd was sentenced by Judge Eric Smith to 8 years with 2 years suspended, and 5 years probation on a count of misconduct involving a controlled substance in the second-degree. The case stemmed from a 2006 robbery of the Susitna Pharmacy in Wasilla. There was not enough evidence to show that Dodd was one of the masked robbers, but he was found in possession of some of the pills stolen from the pharmacy. ADA Rick Allen was the sentencing prosecutor.

Co-defendant Brian Shook was sentenced to 8 years with 3 years suspended on a charge of robbery in the first-degree. The judge found that Shook was less culpable than his accomplices and took responsibility for his role in the robbery. The sentencing prosecutor was ADA Alison Collins.

Ronald Parks was sentenced to 5 years in prison, the statutory maximum, for felony refusal of a breath test. The judge made a “worst offender” finding. Parks was on probation for felony DUI when he committed the new crime. Alison Collins was also the sentencing prosecutor for this case.

Twenty-three-year-old Trevor Elliott was sentenced to serve 10 years, with 5 years suspended and 5 years probation for sexual abuse of a minor in the second-degree, and 60 days in jail for furnishing liquor to a minor. Elliot was staying with the eleven-year-old victim’s parents. Elliot played video games with the victim, gave her alcohol and touched her under her clothing. ADA Rachel Gernat prosecuted this case.

Eugene Lazar pled guilty to a consolidated count of sexual abuse of a minor in the first-degree for sexually abusing a child in 2006. He will be required to serve at least 10 years in prison and register as a sex offender for life. The prosecutor was ADA Rachel Gernat.

Office of Special Prosecutions and Appeals (OSPA)

Appellate Unit

Without fanfare, the Appeals Unit produced much of the materials that were distributed to trial prosecutors at the annual District Attorneys Conference in the second week of October. Also, three attorneys from the Appeals Unit gave presentations at the conference. For all their hard work leading up to and at the conference, the Criminal Division thanks AAGs Blair

Christensen, Tamara de Lucia, Mike McLaughlin, and Diane Wendlandt.

Though the Appeals Unit in October continuously filed briefs defending convictions and sentences, as of October 28th, the Alaska Court of Appeals had issued only seven decisions for the month. Two of the decisions were victories by AAG Blair Christensen. In *Max Schwab v. State*, the court of appeals agreed with Blair that it lacked the jurisdiction to decide a defendant’s challenge to the requirement that he register as a sex offender. The challenge was made by the defendant in his criminal case, and instead (as asserted by Blair) needed to be pursued civilly. Then, in *Brian Cooper v. State*, the court of appeals agreed with Blair that the prosecutor’s use of analogies in her closing argument to explain the burden of proof did not amount to plain error. Consequently, the court of appeals affirmed the defendant’s convictions for first-degree sexual assault, second-degree sexual abuse of a minor, and two counts of third-degree sexual abuse of a minor.

In a third case, this time with AAG Ken Rosenstein representing the state, the court of appeals was persuaded by AAG Rosenstein that the trial court had correctly defined what was “substantial” in response to a jury’s question of what constituted a “substantial risk of death” in a first-degree assault prosecution. See *Lyle Brown v. State*. The defendant’s first jury had hung on the first-degree assault charge, so the affirmance of this first-degree assault conviction represents a successful outcome to a significant amount of effort by the Criminal Division.

Rural Prosecution Unit

The Rural Prosecution Unit absorbed some additional major Bethel felony cases pending for trial and also screened other cases. Work on other major cases took people in the unit to Bethel, Kodiak, and Nome. Several pretrial hearings were conducted telephonically in these locations and also Kotzebue.

SAVE THE DATE

NAAG Winter Meeting – Fort Lauderdale, Florida
December 1-5

Juneau Holiday Party – December 10